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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

DANIEL H. IVANCIC,
Petitioner,

against

MARY OLMSTEAD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the New York
Court of Appeals

ROBERT J. KRZYS
Attorney for Petitioner
108 Division Street
Amsterdam, NY 12010
Telephone (518) 842-3795

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Appellate Courts of the State of New York invade the fact finding function of the jury which found the respondent to be negligent, contrary

to the VII Amendment to the United States Constitution?

2. Did the petitioner present sufficient facts at trial to establish, as a matter of law, the negligence of the respondent?

3. Were the inferences and conclusions drawn from the trial evidence by the Justices of the Appellate Courts of the State of New York correct?

4. Should the complaint of the petitioner be reinstated and this proceeding remanded to the Trial Court for a trial limited to the issue of damages?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the Court whose judgment is sought to be reviewed are Daniel H. Ivancic, as petitioner, and Mary Olmstead, as respondent. There have been no parties either added to or deleted from this proceeding

from the date of its commencement.

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CITATIONS TO THE OPINIONS BELOW

The opinion of the Supreme Court of Montgomery County is not reported in the New York State Reporter Service. The opinions of the New York Supreme Court, Appellate Division, Third Department and the New York Court of Appeals are presently not reported in the New York Reporter Service, but will eventually be included therein when reached in their regular order for publication. All of the Court Decisions and Orders made by the New York State Courts are included in the Appendix to this Petition for a Writ of Certiorari.

JURISDICTION

This Petition for a Writ of Certiorari seeks to have permission granted to appeal to this Court from the final Order entered in the New York Court of Appeals which affirmed the Order of the Appellate Divi-

sion, Third Department, finding, contrary to the verdict of the jury, that the petitioner had not proven a prima facie case in seeking to establish the negligence of the respondent. The jurisdiction upon which this Petition is filed is made pursuant to 28 USC 1257(3), 28 USC 2101(c) & 2104 and Rules 17, 19, 20, 21 and 23 of this Court. This proceeding seeks appellate review of the propriety and correctness of the Orders and underlying Decisions of the New York State Courts which assessed, and thereafter drew different inferences or conclusions from the evidence at trial, contrary to those as found to exist by the jury, and thereafter dismissed the complaint of the petitioner. It is submitted that the action as taken by the Appellate Courts of New York State was contrary to the decisional law of this Court, was not

properly evaluated in terms of the prior decisional law in New York State and was made contrary to the VII Amendment to the United States Constitution.

This Petition is being timely filed with this Court in that 90 days have not elapsed since there was entered in the New York Court of Appeals a denial of the Motion of the petitioner seeking reargument and reconsideration of the Court's initial Decision dated November 26, 1985. The initial decree sought to be reviewed was dated and entered November 26, 1985. Thereafter, the petitioner presented to the Court a Motion for reargument or reconsideration which was decided adverse to him on December 26, 1985. The issue involving the rights of the petitioner as guaranteed to him by the VII Amendment to the United States Constitution was presented to the New York Court of Appeals,

and ultimately rejected by said Court, [Slip Opinion - February 19, 1986].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The VII Amendment to the United States Constitution guarantees to a citizen the following: "In Suits at common law, where the value and controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

STATEMENT OF THE CASE

On September 26, 1980, the petitioner was standing in the driveway of his parents' residence, where he had resided since 1959. At that time, the

petitioner was performing mechanical work on the engine of his truck. At approximately 12:05-12:20 PM, the petitioner heard a crack, and as he looked up, was hit flush in the face with a large tree limb which weighed in excess of a couple of hundred pounds. The force of the blow received knocked the petitioner to the ground, and when he got up, he was bleeding profusely, in tremendous pain, and his nose was flattened down to the cheeks on his face. As a result thereof, he ran into his residence to obtain a towel to control the flow of blood, and then went to find his brother who had only left minutes earlier. The petitioner's brother was found at a local restaurant, and immediately transported the petitioner to a local hospital.

The tree limb in question had fallen from a maple tree located on the respon-

dent's property, approximately 10-15 feet from the Ivancic-Olmstead boundary line. On direct examination, the respondent admitted that she was in charge of the maintenance of her property for a period of 10 years, (1970-1980); that she did not do any of the maintenance herself, but hired people to do so; that no one ever took care of the maple tree - she never hired anyone to do so; that since her occupancy on the property, a previous tree had fallen; that she had a nephew who was at her disposal to maintain her trees without charge; that she never examined or had anyone else examine the tree for a period of 10 years; and that prior to the occurrence, the tree was accessible to her, but she never walked over to it and made any observations.

The petitioner's witnesses tesified that the limb which had struck him had

torn off from the tree's structure. The respondent's nephew testified that in the torn-off area, there existed a crack in which visible dark spots/discoloration of the wood was present. The petitioner called an expert witness, Kenneth Williams, a consulting forester, who testified about his observation of the tree. He testified that the tree exhibited a limb hole of eight inches which had exited for the past 7-10 years; that the original limb had at one time had been eight inches in width, but after deterioration/decay, had shrunk to a five-inch size; that as a result of the limb hole, a crack had occurred, thereby affecting the structure of the tree; that the crack would allow for the emission of water into the tree's structure and over the years, the crack would become larger; and that when a crack would occur, it was nature's way for a callus to

develop on the tree in an attempt to heal or mend the crack. This witness further testified that the callus had exited 3-5 years prior to September, 1980; and that it was of a significant size, being 36 inches wide, and 24 inches in length. It was further shown that said conditions of the tree [limb hole, deterioration, crack and callus] were visible prior to September, 1980; and that the darkened area testified to by the respondent's nephew was present in September, 1980 due to "winter action" resulting in the deterioration of the tree over time. Finally, it was testified that the crack in the tree would open and close when the upper portions of the tree would move in the wind.

The defense presented by the respondent was solely limited to how "beautiful or vigorous" the tree was

prior to September 26, 1980, with the specific qualification that no one ever examined, checked or took any precautionary measures thereto. No contrary expert proof was presented in an attempt to refute the expert witness testifying for the petitioner. For a period of 10 years, the respondent did not ever check, visibly observe or have checked the subject tree, although she admitted that it was she who was in charge of the maintenance of the property.

During their deliberations, the jury obviously had decided on liability being imposed against the respondent, and in the petitioner's favor when it returned to the Court and inquired what amount of money the petitioner was seeking - the amount of his ad damnum clause. The Trial Court refused to provide this information, and the jury thereafter

returned with a verdict of $3,500, which was only $750 more than medical specials. After this verdict was announced, the petitioner sought to set aside said award on the grounds of inadequacy. That Decision was reserved upon, and a few days later, the Trial Court, in a written Decision, held that the verdict was a compromise one and required a new trial to be presented as to all issues.

The petitioner appealed from that portion of the Order which set aside the finding made by the jury as to liability; and the respondent appealed from the entire Order. As a result of those cross appeals, the New York Supreme Court, Appellate Division, Third Department examined the facts adduced at trial, reassessed the questions of credibility, held that the petitioner's expert was not properly qualified, and then reversed the

prior finding of the jury on the issue of liability, holding that the petitioner had not proven a prima facie case, and as a result thereof, his complaint was to be dismissed. The petitioner appealed from said adverse determination, and the same was ultimately affirmed by the New York Court of Appeals. In that state court of last resort, the petitioner preserved the issue of a VII Amendment right that the facts found by the jury in establishing liability should not be reassessed by the Appellate Courts, but instead, that a new trial should have been ordered. The New York Court of Appeals rejected that position, and the filing of this Petition for Writ of Certiorari in this Court has ensued.

ARGUMENT

POINT #1

THE FEDERAL CONSTITUTIONAL RIGHTS OF THE PETITIONER AS EMBODIED IN THE VII AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE APPELLATE COURTS OF THE STATE OF NEW YORK WHEN THEY INVADED THE FACT FINDING FUNCTION OF THE JURY WHICH FOUND THE RESPONDENT TO BE NEGLIGENT

The VII Amendment guarantees to citizens of the United States that no fact tried by a jury shall be re-examined by any Court of the United States except according to the rules of common law. This means that if a case was properly submitted to a jury, an Appellate Court, on reviewing the verdict of the jury, can only affirm or remand for a new trial, and cannot direct a verdict contrary to that entered by the jury, since the direction of a verdict is a usurpation of

the function of the jury to try the facts. If there is sufficient evidence to take the case to the jury, an Appellate Court may not reweigh the evidence and set aside the verdict merely because the Appellate Judges could have drawn different inferences or conclusions from the evidence, or feel that other results might be more reasonable. Only where there is a complete absence of probative facts supporting the verdict can it be overturned. It is the jury's duty to resolve conflicts in the evidence, determine credibility, and so long as there is an evidentiary basis for the verdict, an Appellate Court cannot set the same aside.

In Chicago, B.&Q.R. Co. v. City of Chicago, 166 US 226, it was held that the last clause of the VII Amendment forbids the retrial by an Appellate Court of the facts tried by the jury. This Court

reasoned that said rule was required through an analysis of the common law. In Haupt v. United States, 330 US 631 at 639-640, this Court held that where it is shown that a case was made out for the jury, the verdict cannot be impeached on appeal by assigning different views to the testimony of various witnesses. In Mortensen v. United States, 322 US 369 at 374, this Court held that an Appellate Court would normally be precluded from reviewing or disturbing the inferences of fact drawn from the evidence by a jury. In Taylor v. Mississippi, 319 US 583 at 585, it was held by this Court that where certain evidence was contradictory and conflicting, it was the duty and obligation of the jury to resolve said conflicts.

In Lavender v. Kurn, 327 US 645 at 652-653, this Court held that the

Missouri Supreme Court was incorrect in reversing a Judgment for a petitioner on questions of negligence which resulted in a death occurring in a railroad yard. It was held that it would be an undue evasion of a jury's historic function for an Appellate Court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. Further, it was stated that an Appellate Court's function is exhausted when an evidentiary basis for the verdict becomes apparent, and it would be immaterial that an Appellate Court might draw contrary inferences or feel that other conclusions are more reasonable.

In Sentilles v. Inter-Caribbean Shipping Corp., 361 US 107 at 109-110, this Court reversed an Order of the Court of Appeals for the Second Circuit which

had reversed a Judgment of the district court finding negligence and awarding money damages. It was stated that the power of a jury to draw inferences as to the aggravation of a tubercular condition (as having not been caused by the accident) was not impaired by the failure of any medical witness to testify that it was in fact the cause. This ruling would control notwithstanding the fact that the medical witness failed to testify as to the cause in question. It was reasoned that the members of the jury, not medical witnesses, were sworn to make a legal determination of the question of causation. It was the jury which was entitled to take all circumstances including medical testimony into consideration. This Court held that it would not be the function of the lower Courts to search the record for conflicting circumstances in order to take the

case away from the jury on a theory that the proof presented gave equal support to inconsistent and uncertain inferences. The very essence of the function of the jury is to select from those conflicting inferences and conclusions that which it considers the most reasonable. Appellate Courts would not be free to reweigh evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results would be more reasonable.

In Gallick v. Baltimore and Ohio Railroad Company, 372 US 108 at 112-119, this Court considered the very issues presented in the present proceeding, on questions of negligence, circumstantial evidence and whether the special verdict of the jury as entered in the Trial Court and later reversed was proper. It was

held that the intermediate Appellate Court in Ohio acted improperly when it invaded the function and province of the jury as to various proof presented. The intermediate Appellate Court had required direct evidence of a certain type of insect which had bitten that petitioner and resulted in an infection, which later caused his death. The Decision of the intermediate Appellate Court finding that the evidence was not sufficient to establish a prima facie case was reversed when this Court found that the evidence in question was sufficient, and it was the fact finding function of the jury to resolve conflicting inferences.

> 'It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and the inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The

> very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable....That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the judges feel that other results or more reasonable....'

The determination of the intermediate Appellate Court of Ohio was thereafter reversed and the Judgment of the Trial Court reinstated.

In Basham v. Pennsylvania Railroad Company, 372 US 699 at 700-701, the New York Court of Appeals had affirmed a Decision of the Appellate Division which had affirmed an Order of the Trial Court which set aside a verdict in favor of

the petitioner, who was an employee. The basis of setting aside the verdict was the same in that case as is present in this proceeding, to wit: that the jury verdict establishing negligence had not been sufficiently proven. This Court held that any conflicting testimony had been resolved by the verdict of the jury in favor of the petitioner and there being an evidentiary basis for that verdict, it was error for the New York Trial and Appellate Courts to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury. This Court went on to find that although the petitioner's evidence was disputed, it did in fact constitute probative facts sufficient to support the jury's finding of negligence and that the New York State Courts had improperly invaded the function and province of the jury in setting the

verdict aside.

It appears from the Decisions of the New York State Appellate Courts in this proceeding that a determination was made to reject the testimony of the petitioner's expert witness and to then deem the testimony of the respondent more credible. It was she who represented to the jury that she had no actual or constructive knowledge of any defects in the maple tree prior to September 26, 1980. The petitioner's expert contradicted that testimony and mentioned no less than three observable areas of decay and deterioration which were observable prior to September 26, 1980. The negligence of the respondent was that she failed to make the required observations for a period of 10 years, or failed to hire someone to make those observations and reasonably assure the petitioner that he would not sustain the serious injuries and

damages which he did when the large maple tree broke apart and came crashing down upon his person.

In assessing the legal issue of due care through inspection, a unanimous Court of Appeals in Danaher v. City of Brooklyn, 119 NY 241, held that "Trees, bridges and other wooden structures will necessarily decay and become unsafe, and where they may thus become dangerous to human life, the duty devolves upon the municipality to make tests and examinations, using reasonable diligence to ascertain whether they are safe or not." The respondent never took any of such steps within her required duty owed to the petitioner. In McGarey v. City of New York, 89 AD 500, it was held that there did exist in New York State a duty imposed by law to make proper examination for the purpose of ascertaining the true condition

of trees in public places. It was held that such a duty would not include always requiring extraordinary tests, but the failure to make any tests may well be taken as a circumstance upon the subject of a defendant's negligence in ascertaining whether the safety of the public requires any acts to be taken where such examination has disclosed conditions from which suspicion of danger may fairly arise. In Tagg v. City of Lockport, 228 AD 319, it was held that a defendant was obligated to exercise reasonable diligence in making inspections and tests of trees, and where such examinations revealed that the condition of the tree would reasonably be likely to cause a physical injury, an obligation was incurred to remove or repair the tree. In that case, a failure to inspect for a period of one year sustained an award of liability. In the present proceeding, the

facts are much more pronounced, the length of time being ten times the one-year period in said case. In Siegel v. State of New York, 56 Misc.2d 918, it was held that there existed a duty to use reasonable diligence in inspecting trees that are likely to become decayed and dangerous to users of the highway. "Failure to so inspect is negligence which becomes the proximate cause of the accident." A failure to inspect for a period of two and one-half years was held to constitute constructive notice. In Harris v. Village of East Hills, 41 NY2d 446, it was held that where there existed objective signs of decay such as a cavity in the trunk of a tree or any other decay, this would trigger liability.

The petitioner's expert described in detail the decay which existed on the tree prior to it splitting, presented

evidence as to why the same was able to be observed, discussed the length of time which the condition existed, and then set forth why the accident occurred. This proof was further supplemented with photographs admitted into evidence. No contrary expert proof was presented, and the respondent merely asserted that she had no actual or constructive knowledge of the condition. The jury was properly charged on the law and then assessed credibility, applied the law to the facts and determined that the respondent had breached her duty owed to the petitioner which constituted negligence and resulted in an award in favor of the petitioner. The Appellate Courts of New York State reweighed that evidence and drew different inferences or conclusions therefrom in reversing the finding of liability and the subsequent dismissal of the complaint of

the petitioner.

In doing so, said Courts attacked the opinion of the petitioner's expert witness, premised upon his education and knowledge and the date of his inspection of the maple tree. First, the degree of weight given to this witness' testimony was a jury function or determination; and second, the correct facts were not relied upon, for at the time of the inspection, the "eight foot stump" still showed all of the indicia of the disease and decay which had existed up to and including September 26, 1980. Prior to the inspection, the tree had been cut above the crotch, thereby leaving all lower portions of the tree, inclusive of the diseased and defective area, intact for inspection. The expert witness did not examine an "eight foot stump" and then surmise or guess as to why the limb fell; but instead,

examined specific areas of decay which had been preserved, and then rendered his opinion in open court. This testimony referred to a limb hole, (where a limb had once existed and decayed over a period of 7 to 10 years); the callus or bark disturbance which was large in size; and the crack in the tree running from eye level up to a height of approximately eight feet. In essence, the Appellate Courts of New York State were attempting to act in the place and stead of the jury.

This Appellate Court action as taken violated the VII Amendment to the United States Constitution. For said reasons, the Petition for Writ of Certiorari should be granted to reverse and vacate the Orders made by the New York State Courts which set aside the finding of liability as made by the jury after trial.

CONCLUSION

THE PETITION REQUESTING A WRIT OF CERTIORARI SHOULD BE GRANTED; THE ORDERS AND UNDERLYING DECISIONS OF THE NEW YORK STATE COURTS SETTING ASIDE LIABILITY, REVERSED AND VACATED; THE VERDICT OF THE JURY ON THE ISSUES OF LIABILITY REINSTATED; AND THIS CASE REMANDED TO THE TRIAL COURT FOR A NEW TRIAL LIMITED TO THE ISSUE OF THE AMOUNT OF DAMAGES WHICH THE PETITIONER IS ENTITLED TO RECEIVE.

Dated: March 24, 1986.

Respectfully submitted,

ROBERT J. KRZYS
Attorney for Petitioner
108 Division Street
Amsterdam, NY 12010
Telephone (518) 842-3795

APPENDIX

Decision of Trial Court Setting Aside Jury Verdict and Ordering a New Trial

STATE OF NEW YORK
SUPREME COURT
COUNTY OF MONTGOMERY

DANIEL H. IVANCIC,
Plaintiff

against

MARY OLMSTEAD,
Defendant

CARROL S. WALSH, J.:

After a three day trial, the jury, in this negligence action, returned a verdict in favor of the plaintiff in the amount of $3500 for personal injuries. The plaintiff thereupon moved to set the verdict aside on the ground of inadequacy and for an order directing a new trial on the issue of damages only. The defendant moved to set the verdict aside as contrary to the weight of the evidence. The court

denied defendant's motion and reserved decision as to plaintiff's motion, which it now addresses.

The action arises out of an incident which occurred on September 26, 1980 when plaintiff, while standing in the driveway of his parents' property working on a truck motor, was struck in the face and on his body by a large tree limb which had broken off and fallen from a maple tree standing within the boundary of the adjoining property of the defendant. The plaintiff was dealt a heavy blow and sustained a severely fractured nose, requiring immediate surgery under general anesthesia to repair it, and further corrective surgery three months later, under general anesthesia, so that the nose would become functional. Additionally, plaintiff

sustained lacerations, bruises and contusions and is left with two facial scars, one on the bridge of his nose and one above his upper lip, although neither is particularly prominent. Plaintiff's medical expense, for doctor and hospital, amounted to slightly more than $2700.

Liability was vigorously contested. Plaintiff contended that the tree on defendant's property was defective, that therefore she maintained a dangerous condition on her property, that this condition was the proximate cause of the limb to fall, that the defendant knew or because the condition had existed for so long that she should have known of the dangerous defect, and that she failed to properly maintain her property and to remedy the condition. In short, plaintiff

claims that the defendant was negligent and that she is liable to him in damages by reason of her negligence upon the facts and circumstances presented.

The defendant, of course, denied any knowledge of a defect in the tree and contended that there were no facts or circumstances disclosed with respect to this tree, which all agreed appeared to be healthy and vigorous, which would alert her as to any defect and that in no way could any negligence in this instance be attributed to her.

It is well settled that a jury's assessment of damages in a personal injury suit should not be disturbed unless it is so excessive or inadequate that it shocks the conscience of the court. When this occurs, however, the court is empowered

to exercise its discretion and set aside the verdict. Considering all of the evidence in this case, it is manifest that the jury's award as to the total damages sustained by the plaintiff for his personal injuries and out-of-pocket medical expense is grossly inadequate and unconscionable, and does, indeed, shock the conscience of the court. The total award exceeds the medical expense by only $800. and does not represent fair compensation to the plaintiff, and a new trial is warranted.

However, there must be a new trial on both liability and damages rather than one limited to the issue of damages only, as sought by plaintiff. When the dispute as to liability is sharp and the resulting verdict is clearly inadequate, the stigma of compromise attaches and

proper relief in such an instance is to grant a new trial on both issues of liability and of damages. In the case at bar, there was a sharp issue as to liability, as to whether the defendant was responsible regardless of injuries. If the plaintiff was entitled to recover at all, he was entitled to an amount substantially greater than that awarded. Either the damages awarded plaintiff should have been greater or there should have been a finding of no liability. Upon this record, the conclusion that the jury members compromised their views on the liability question in exchange for agreement as to damages is inescapable.

Accordingly, the verdict in favor of plaintiff is set aside and a new trial granted and ordered, on both the

Decision of Trial Court Setting Aside Jury Verdict and Ordering a New Trial

issues of liability and of damages.

Submit order.

Dated, February 11, 1984.

/s/ Carrol S. Walsh, Jr.
J. S. C.

TO: ROBERT J. KRZYS, ESQ.
Attorney for Plaintiff
108 Division Street
Amsterdam, New York 12010

ROBERT ARMSTRONG, ESQ.
Attorney for Defendant
Law Offices of Donohue, Donohue & Sabo, P.C.
101 Columbia Street
Albany, New York 12210

Order of Trial Court Setting Aside Jury Verdict and Ordering a New Trial

STATE OF NEW YORK
SUPREME COURT
COUNTY OF MONTGOMERY

DANIEL H. IVANCIC,
Plaintiff,

against

ORDER
Index No. 82 903

MARY OLMSTEAD,
Defendant.

The issues in the above-entitled action having been duly brought on before the Honorable Carrol S. Walsh, J.S.C., and a jury at trial term of this Court, held in and for the County of Montgomery, at the County Courthouse in Fonda, New York, on February 8, 1984, and the parties having duly appeared by counsel and the issues having been duly tried, and the jury have on February 10, 1984, duly rendered a verdict in favor of the plaintiff, Daniel H. Ivancic, in the

sum of THREE THOUSAND FIVE HUNDRED and no/100, ($3,500.00) DOLLARS against the Defendant, Mary Olmstead and

A motion having been made by the Plaintiff to set the verdict aside on the ground of inadequacy and for an order directing a new trial on the issues of damages only, and a motion having been made by the defendant to set aside the verdict as contrary to the weight of the evidence, and the Court having rendered a decision on February 11, 1984, and a motion for leave to reargue/renew the court's decision having been granted, to Plaintiff, and reargument having been had and heard, it is hereby

ORDERED, that the Plaintiff's motion be denied, the Defendant's motion be denied, and that the verdict in favor of

Order of Trial Court Setting Aside
Jury Verdict and Ordering a New Trial

the Plaintiff be set aside and a new trial be granted and ordered on both the issues of liability and of damages.

Dated: April 18, 1984
Johnstown, New York

/s/ Carrol S. Walsh, Jr.
J. S. C.

ENTER: April 24, 1984

Decision of Supreme Court
Appellate Division-Third Department
on Cross Appeals

STATE OF NEW YORK
SUPREME COURT
APPELLATE DIVISION-THIRD DEPARTMENT

July 3, 1985

DANIEL H. IVANCIC,
Appellant-Respondent,

v

MARY OLMSTEAD,
Respondent-Appellant.

MAIN, J.P.

Cross appeals from an order of the Supreme Court at Trial Term (Walsh, Jr., J.), entered April 24, 1984 in Montgomery County, which set aside a verdict in favor of plaintiff and granted a new trial.

On September 26, 1980, plaintiff was working on his truck in the driveway of his parents' home located on Prospect Street in the Village of Fultonville,

Montgomery County. The property adjoining on the west has been owned by defendant since 1970 and is her home. At about noontime, while a heavy windstorm was in progress, a limb from a maple tree located on defendant's property fell and struck plaintiff, causing him to sustain severe personal injuries. As a result, plaintiff commenced this action against defendant seeking damages for those injuries. After a jury trial, the jury rendered a verdict in favor of plaintiff in the sum of $3,500. Plaintiff moved to set aside the verdict upon the ground of inadequacy and defendant moved to set the verdict aside being against the weight of the evidence. The court denied defendant's motion and reserved as to plaintiff's

motion, but ultimately found the verdict to be one of compromise and ordered a new trial on the issues of both liability and damages. After granting reargument, Trial Term adhered to its original decision and these cross appeals followed.

Defendant maintains, primarily, that plaintiff's proof was inadequate and failed to present a triable issue of fact as to defendant's alleged negligence in connection with the issue of notice and that, thus, her motion for dismissal of the complaint made at the conclusion of plaintiff's case should have been granted. There is no question or issue as to what defendant's duty was. She was required, as a property owner, to exercise care so as to maintain the property in a reasonably

safe condition. As for plaintiff, to entitle him to recover he must demonstrate that defendant's tree was in a condition dangerous to the persons on the adjoining property; that the condition of the tree was a proximate cause of his injury; that defendant realized or, in the exercise of reasonable care, should have realized its danger to plaintiff; and that defendant knew of the condition for a period of time prior to plaintiff's injury to permit defendant in the exercise of reasonable care to have corrected it (see 1 NY PJI 2:110 [2d ed], p 313 [1974]). Presented is the question of whether the proof adduced was sufficient to demonstrate that defendant actually knew of the dangerous condition or, alternatively, should, in

the exercise of reasonable care, have realized that such a condition existed.

After a fair reading of this record, it cannot be said, and indeed, it is not contended that defendant had actual notice of the alleged defective condition. Moreover, there is no competent evidence from which it could be properly concluded that she had constructive notice of this condition. Plaintiff's mother and brother both testified that the tree appeared healthy and that, although the tree limbs extended over their property, they had never known the tree to lose any of its branches. Thus, there had been no reason for any discussion with defendant about the tree. Significantly, not one of the witnesses who had observed the tree prior

to this incident testified as to observing as much as a withering or dead leaf or barren branch or discoloration or any of the other telltale signals which would alert the viewer to the possibility that the tree or one of its branches was decayed, diseased or unsound.

Furthermore, the testimony of plaintiff's expert does not provide a basis to conclude that defendant should have realized that a dangerous condition existed. Plaintiff's expert, Kenneth Williams, a forestry college graduate, never saw the tree until the morning of trial almost four years after the incident, at which time all that remained was an approximately eight-foot stump. Several weeks after the incident, he had been

given what was claimed to be a piece of the fallen branch to examine which he found to be free of disease or decay. Williams' opinion was based on these observations, as well as on some photographs admitted into evidence at the trial. He opined that water had invaded a "limb hole" on the tree, thus causing decay which resulted in a crack occurring below. Williams testified that the open crack then became covered with a callus, nature's way of healing plant surfaces, but that, in spite of the callus, the tree remained weakened and that this was the cause of the limb's falling. Most significant was his testimony that this area was partially, if not totally, obscured from ground level view. Williams' clear message was that he

was able to recognize this condition by reason of his special education and experience, which afforded him knowledge not possessed by the general populace. Hence, it is clear from the expert testimony that while the subject tree might well have been diseased, it was not in such a patently defective and dangerous condition as to have enabled defendant, a woman with no special education or experience in the field of forestry, to recognize the possibility that a dangerous condition existed.

In conclusion, this case is readily distinguishable from those several cases relied upon by plaintiff where the evidence of disease and decay was obvious even to the untrained eye. Rather, it is akin to Berkshire Mut. Fire Ins. Co. v.

Decision of Supreme Court
Appellate Division-Third Department
on Cross Appeals

State of New York (9 AD2d 555), where, as here, the tree exhibited indications of vigor and strength but fell prey to unusual and excessive turbulence along with countless other limbs and trees. Since there was a failure to establish the existence of a danger, recognizable by defendant, plaintiff's proof was inadequate and defendant's motion should have been granted at the close of plaintiff's case.

Order reversed, on the law, with costs to defendant, and complaint dismissed.

MAIN, J.P., YESAWICH, JR., LEVINE and HARVEY, JJ., concur; MIKOLL, J., dissents and votes to affirm on the opinion of Justice Carrol S. Walsh, Jr. at Trial Term.

Order on Cross Appeals

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York commencing on the 15th day of April, 1985.

PRESENT: HON. ROBERT G. MAIN,
Justice Presiding,
HON. ANN T. MIKOLL
HON. PAUL J. YESAWICH, JR.
HON. HOWARD A. LEVINE
HON. NORMAN L. HARVEY,
Associate Justices.

STATE OF NEW YORK APPELLATE DIVISION
SUPREME COURT THIRD DEPARTMENT

DANIEL H. IVANCIC,
Appellant-Respondent,

v ORDER

MARY OLMSTEAD,
Respondent-Appellant.

Appellant-Respondent Daniel H. Ivancic, having appealed and Respondent-Appellant Mary Olmstead, having cross-

Order on Cross Appeals

appealed from an Order of the Supreme Court, Trial Term, Montgomery County, entered on the 24th day of April, 1984, in the office of the Clerk of the County of Montgomery, and said appeals having been presented during the above-stated term of this Court and having been argued by Robert J. Krzys, Esq., of counsel for appellant-respondent, and by Donohue, Donohue & Sabo, P.C., Fred J. Hutchison, Esq., of counsel for respondent-appellant, and, after due deliberation, the Court having rendered a decision on the 3rd day of July, 1985, (Justice Mikoll dissenting), it is hereby

ORDERED, that the Order so appealed from be and hereby is reversed, on the law, with costs to defendant, and complaint dismissed.

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Order on Cross Appeals

E N T E R:

/s/ Michael J. Novack
CLERK

DATED AND ENTERED: July 30, 1985.

/s/ Michael J. Novack

Decision of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

DANIEL H. IVANCIC,
Appellant,

v. OPINION

MARY OLMSTEAD,
Respondent.

JASEN, J:

At issue on this appeal is whether plaintiff, who seeks to recover for injuries sustained when an over-hanging limb from a neighbor's maple tree fell and struck him, established a prima facie case of negligence and whether trial term erred, as a matter of law, in refusing to submit to the jury the cause of action sounding in common law trespass.

Plaintiff was working on his truck in the driveway of his parents' home located in the Village of Fultonville, New

York. Since 1970, defendant has owned and lived on the property adjoining to the west. A large maple tree stood on defendant's land near the border with plaintiff's parents' property. Branches from the tree had extended over the adjoining property. During a heavy windstorm on September 26, 1980, an over-hanging limb from the tree fell and struck plaintiff, causing him serious injuries. As a result, plaintiff commenced this action, interposing causes of action in negligence and common law trespass.

At trial, the court declined to charge the jury on the common law trespass cause of action or on the doctrine of res ipsa loquitur, submitting the case solely on the theory of negligence. The jury rendered a verdict in favor of the

plaintiff in the sum of $3,500. Both parties moved to set aside the verdict, the plaintiff upon the ground of inadequacy, and the defendant upon the ground that the verdict was against the weight of the evidence. The court ultimately found the verdict to be one of compromise and ordered a new trial on the issues of both liability and damages.

Upon cross appeals, the Appellate Division reversed, on the law, and dismissed the complaint. The court reasoned that no competent evidence was presented upon which it could properly be concluded that defendant had constructive notice of the alleged defective condition of the tree. The Appellate Division did not address the correctness of the trial court's ruling in declining to charge the

jury on the common law trespass cause of action. For the reasons that follow, the order of the Appellate Division should be affirmed.

Considering first the negligence cause of action, it is established that no liability attaches to a landowner whose tree falls outside of his premises and injures another unless there exists actual or constructive knowledge of the defective condition of the tree. (Harris v Village of East Hills, 41 NY2d 446, 449; Second Restatement of Torts, § 363; Prosser, Law of Torts, 5th ed, p 390.)

Inasmuch as plaintiff makes no claim that defendant had actual knowledge of the defective nature of the tree, it is necessary to consider whether there was sufficient competent evidence for a jury

to conclude that defendant had constructive notice. We conclude, as did Appellate Division, that plaintiff offered no competent evidence from which it could be properly found that defendant had constructive notice of the alleged defective condition of the tree. Not one of the witnesses who had observed the tree prior to the fall of the limb testified as to observing so much as a withering or dead leaf, barren branch, discoloration, or any of the other indicia of disease which would alert an observer to the possibility that the tree or one of its branches was decayed or defective.

At least as to adjoining landowners, the concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently

and constantly check all trees for non-visible decay. Rather, the manifestation of said decay must be readily observable in order to require a landowner to take resonable steps to prevent harm. (See Berkshire Mut. Fire Ins. Co. v State of New York, 9 AD2d 555.) The testimony of plaintiff's expert provides no evidence from which the jury could conclude that defendant should reasonably have realized that a potentially dangerous condition existed. Plaintiff's expert never saw the tree until the morning of the trial when all that remained of the tree was an eight-foot stump. He surmised from this observation and from some photographs of the tree that water invaded the tree through a "limb hole" in the tree, thus causing decay and a crack occurring below.

However, the expert did indicate that the limb hole was about eight feet high and located in the crotch of the tree which would have made it difficult, if not impossible, to see upon reasonable inspection. Although there may have been evidence that would have alerted an expert, upon close observation, that the tree was diseased, there is no evidence that would put a reasonable landowner on notice of any defective condition of the tree. Thus, the fact that defendant landowner testified that she did not inspect the tree for over ten years is irrelevant. On the evidence presented, even if she were to have inspected the tree, there were no indicia of decay or disease to put her on notice of a defective condition so as to trigger her duty as a landowner to take reasonable steps

to prevent the potential harm.

Since the evidence adduced at trial failed to set forth any reasonable basis upon which notice of the tree's defective condition could be imputed to defendant, and recognizing that the cases relied upon by plaintiff are readily distinguishable[1], we agree with the view of the Appellate Division that plaintiff failed to establish a prima facie case of negligence.

Turning to plaintiff's claim of error by the trial court in declining to submit to the jury the cause of action sounding in common law trespass, we conclude there was no error. The scope of the common law tort has been delineated in Phillips v Sun Oil Co. (307 NY 328), wherein this court held: "While the defendant

to be liable need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must be the immediate or inevitable consequence of what he willfully does or what he does so negligently as to amount to willfulness." (Phillips v Sun Oil Co., 307 NY 328, 331.) In this case, there is evidence that defendant did not plant the tree, and the mere fact that defendant allowed what appeared to be a healthy tree to grow naturally and cross over into plaintiff's parents' property airspace, cannot be viewed as an intentional act so as to constitute trespass. (See Turner v. Coppola, 102 Misc 2d 1043 [overhanging tree branches are not an intentional invasion of adjoining property and are

therefore not a trespass on adjoining property].) Language in Countryman v Lighhill (24 Hun 405) is not contrary to this holding. There, the court stated that no liability could be imposed "absent real sensible damages" resulting from the overhanging branches. However, in Countryman, the theory of recovery was nuisance rather than trespass and the damage the court was referring to appears to be damage to land rather than damage to person. (See McKenna v. Allied Chem. & Dye Corp., 8 AD2d 463, 467.)

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* *

On review of submissions pursuant to section 500.4 of the Rules, order affirmed, with costs. Opinion by Judge Jasen. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander and Titone concur.

Decided November 26, 1985

Decision of New York Court of Appeals

Footnote Page

[1] Plaintiff principally relies on three cases which he claims support the jury's finding of negligence: Harris v Village of East Hills (supra), Rinaldi v State of New York (49 AD2d 361) and Edgett v State of New York (7 AD2d 570). However, each of these cases is factually distinguishable from this case. In Harris, the Village of East Hills was found liable when a defective tree fell on a passing motorist. The tree in that case was "patently defective" and contained a "cavity which was observable on ordinary inspection". It is interesting to note that in Harris, the county, whose duty it was to inspect the trees from the highway, was not found liable because the exterior sign of decay was on the backside of the tree which faced away from the road. In Rinaldi v State of New York (supra), inspection would have revealed a hole one foot deep and one foot in diameter in the tree. The state highway authorities were also on notice that trees of the same age and species as the fallen tree had been found diseased two years earlier. Recognizing that each case should turn on its particular facts, the state was found liable in that it failed to make an observation that would have alerted the state to the "readily observable" condition of the tree. (Id, at p 364.) Finally, in Edgett v State of New York (supra), the state had actual notice of the defective nature of the tree. Witnesses testified that the tree decay was readily visible.

Remittitur of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

DANIEL H. IVANCIC,
Appellant,

v.

MARY OLMSTEAD,
Respondent.

The appellant in the above entitled appeal appeared by Robert J. Krzys, Esq.; the respondent appeared by Donohue, Donohue & Sabo, P.C.

The Court, after due deliberation, orders and adjudges that on review of submissions pursuant to section 500.4 of the Rules, order affirmed, with costs. Opinion by Judge Jasen. Chief Judge Wachtler and Judges Meyer, Simons, Kaye, Alexander and Titone concur.

The Court further orders that this record of the proceedings in this Court

Remittitur of New York Court of Appeals

be remitted to the Supreme Court, Montgomery County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Donald M. Sheraw
DONALD M. SHERAW,
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, November 26, 1985.

Decision Denying Reargument

STATE OF NEW YORK
COURT OF APPEALS

DANIEL H. IVANCIC,
Appellant,

v.

MARY OLMSTEAD,
Respondent.

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements.

Dated: December 26, 1985

Decision Denying Reargument

STATE OF NEW YORK
COURT OF APPEALS

DANIEL H. IVANCIC,
Appellant,

v.

MARY OLMSTEAD,
Respondent.

Motion for reargument &c. denied with twenty dollars costs.

We note that in seeking reargument plaintiff has failed to comply with this Court's rule requiring that ten copies of a brief or memorandum be filed (22 NYCRR 500.11[g]).

Dated: February 19, 1986